

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**IN THE MATTER OF**

**RATES FOR INTERSTATE INMATE CALLING  
SERVICES**

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**WC Docket No. 12-375**

**COMMENTS OF MICHAEL S. HAMDEN<sup>1</sup>**

**INTRODUCTION**

The following remarks are intended to respond to some of the important issues addressed in the Second Further Notice of Proposed Rulemaking.<sup>2</sup>

In this proceeding, the FCC has expressed a preference for genuine competition rather than the imposition of a regulatory regime.<sup>3</sup> Regrettably, in the context of ICS, the market has failed, the kind of competition that ensures consumer protection is entirely lacking, and comprehensive regulation is imperative.

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<sup>1</sup> Hamden, a private practitioner, has more than 25 years of experience representing prisoners in a variety of matters, including issues pertaining to prison pay telephones. He has previously filed comments regarding practices of the prison pay phone industry, individually and on behalf of North Carolina Prisoner Legal Services, a nonprofit inmate advocacy group. The most recent of those filings (2005 – 2010) are listed at: [http://apps.fcc.gov/ecfs/comment\\_search/execute?proceeding=12-375&applicant=Hamden&lawfirm=&author=&disseminated\\_minDate=1%2F1%2F96&disseminated\\_maxDate=12%2F31%2F14&received\\_minDate=&received\\_maxDate=&dateCommentPeriod\\_minDate=&dateCommentPeriod\\_maxDate=&dateReplyComment\\_minDate=&dateReplyComment\\_maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionTypeId=&checkbox\\_exParte=true](http://apps.fcc.gov/ecfs/comment_search/execute?proceeding=12-375&applicant=Hamden&lawfirm=&author=&disseminated_minDate=1%2F1%2F96&disseminated_maxDate=12%2F31%2F14&received_minDate=&received_maxDate=&dateCommentPeriod_minDate=&dateCommentPeriod_maxDate=&dateReplyComment_minDate=&dateReplyComment_maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionTypeId=&checkbox_exParte=true); and earlier comments at: [http://apps.fcc.gov/ecfs/comment\\_search/execute?proceeding=96-128&applicant=Hamden&lawfirm=&author=&disseminated\\_minDate=01%2F01%2F1996&disseminated\\_maxDate=03%2F23%2F2013&received\\_minDate=01%2F01%2F1996&received\\_maxDate=03%2F23%2F2013&dateCommentPeriod\\_minDate=&dateCommentPeriod\\_maxDate=&dateReplyComment\\_minDate=&dateReplyComment\\_maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionTypeId=&checkbox\\_exParte=true](http://apps.fcc.gov/ecfs/comment_search/execute?proceeding=96-128&applicant=Hamden&lawfirm=&author=&disseminated_minDate=01%2F01%2F1996&disseminated_maxDate=03%2F23%2F2013&received_minDate=01%2F01%2F1996&received_maxDate=03%2F23%2F2013&dateCommentPeriod_minDate=&dateCommentPeriod_maxDate=&dateReplyComment_minDate=&dateReplyComment_maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionTypeId=&checkbox_exParte=true)

<sup>2</sup> “Rates for Interstate Inmate Calling Services; Second Further Notice of Proposed Rulemaking; Proposed Rule,” FCC 14–158, 79 Fed. Reg. 225 (21 November 2014), pp. 69682 – 69708 [hereafter, 2<sup>nd</sup> FNPRM].

<sup>3</sup> See, e.g., 2<sup>nd</sup> FNPRM at p. 3. See also, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting in Part (14 October 2014); *Id.*, Statement of Commissioner Michael O’Rielly, Concurring in Part and Dissenting in Part (14 October 2014).

The ICS market is dominated by unique circumstances which create perverse and self-perpetuating incentives that result in the exploitation of consumers. Exclusive contracts omit consumer interests from consideration, instead prioritizing site commissions for correctional authorities and profits for service providers. As a result, consumers are precluded from exercising preferences for competitive services and suffer serious economic and other harms.

It is universally recognized that abuses permeate the present system for the provision of ICS services. Site commissions drive ever-escalating rates, and a burgeoning array of ancillary charges dramatically increases consumer costs. In the absence of competitive pressures and the dynamics of a free market, the abuses continue to spiral out of control.

ICS providers and correctional professionals contend that meaningful competition is impractical in a correctional setting because of constraints on physical facilities, equipment requirements, and security needs. If that is so, then the ills of a monopolistic system can be ameliorated only through comprehensive regulation.

The 2013 *Inmate Calling Report and Order and FNPRM*<sup>4</sup> adopted a cost-based approach, implementing interim interstate caps to ensure just and reasonable rates. Since then, there have been strong indications of industry maneuvering to side-step the modest constraints that have been imposed. Site commissions have reportedly increased, ancillary fees have proliferated, and new modalities of calling have been utilized, including “convenience” payment options, all to circumvent per-minute rate caps by offering flat-fee calls, for example, as high as \$14.00 per call.

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<sup>4</sup> “*Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking,” WC Docket No. 12-375, 28 FCC Rcd 14107, 78 Fed. Reg. 219 (13 November 2013), pp. 68005 – 68015 [hereafter, Report & Order].

Predictably, ICS providers have moved away from areas where profit margins are regulated to services where no regulation exists.<sup>5</sup> As Chairman Wheeler observed, comprehensive reform is imperative if we are to avoid a “never ending game of ICS rate whack-a-mole.”<sup>6</sup>

The FCC should adopt a comprehensive approach to the regulation of ICS providers which encompasses not only intrastate and interstate calling rates,<sup>7</sup> but one which also eliminates commissions, circumscribes ancillary charges, and regulates charges for video visitation, voice mail, and fees for families to make deposits into prisoner trust accounts.

There are clear moral imperatives for the FCC to proscribe extortionate prison phone rates, to prohibit unjustifiable ancillary fees, and to end exploitive practices. And the FCC has plenary legal authority to do so.

## **I. THE FCC HAS JURISDICTION AND THE LEGAL AUTHORITY TO REGULATE ALL ASPECTS OF THE ICS INDUSTRY**

The myriad questions that arise in the context of FCC’s authority to regulate ICS are all answered with reference to the controlling provisions of the Telecommunications Act of 1996.<sup>8</sup>

In relevant part, Section 201 of the Act provides:

(b) All charges, practices, classifications, and regulations for and in connection with [wire and radio] communication service, shall be just and

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<sup>5</sup> Cf., Comments of Darrell Baker (Director, Utility Services Division, Alabama Public Service Commission): “If providers are permitted an alternative to regulated ICS rates it will encourage migration of calls to the more lucrative alternative.” FCC Workshop on Further Reform of Inmate Calling Services, Transcript p. 27 (9 July 2014).

<sup>6</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Statement of Chairman Tom Wheeler, (14 October 2014).

<sup>7</sup> Cf., Comments of Darrell Baker, *supra*, at Tr. p. 25 (“Until both jurisdictions [interstate and intrastate] are addressed there will be no substantive relief for the majority of inmates and their families”).

<sup>8</sup> Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

47 U.S.C. Section 201(b).

Section 276(b)(1)(A) of the Act states:

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that –  
(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . .

47 U.S.C. Section 276(b)(1)(A).

Title 47 U.S.C. Sections 276 and 201 of the Act empower the Commission with a mandate to (1) “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone,” § 276(b)(1)(A), and to (2) ensure that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable” § 201(b). It is especially noteworthy that § 276(b)(1)(A) expressly encompasses “intrastate and interstate” calls.

The statutory language is clear and expansive. The Commission is charged with the responsibility of balancing the competing interests of ICS consumers, who are entitled to just and reasonable charges and practices, with ICS providers, who are entitled to fair compensation.

These provisions specifically apply to the ICS industry:

As used in this section, the term “payphone service” means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

47 U.S. C. 276(d) Payphone Service defined.

And the regulatory actions the FCC chooses to take in the public interest preempt state law and regulation.

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. Section 476(c) State Preemption.

However, some dissonance is introduced by 47 U.S.C. § 152, which provides in pertinent part:

(b) [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .

47 U.S.C. Section 152(b)(1).

In the context of the ICS industry, Section 152 is difficult to reconcile with the mandate of Section 201 that all wire communication service charges and practices “shall be just and reasonable.” Given Section 201’s declaration that unjust and unreasonable charges and practices are illegal, and in light of the Commission’s charge to “promote the widespread deployment of payphone services to the benefit of the general public . . .for each and every completed intrastate and interstate call . . .,” which appears in Section 276, the overarching purpose of the Federal Communications Commission must be given preeminence:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by

law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. Section 151 (in relevant part).

This sweeping delegation of authority is consonant with the mission of the Commission. The Commission’s duties and powers are, by definition, vast – it “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>9</sup>

These broad powers must be given practical application to the narrower questions pertinent to the matters at hand. To effectuate the purposes of the Act as directed in Section 303, Section 276 must be understood to confer broad discretion to regulate intrastate ICS rates and practices that are unjust and unreasonable, that manifestly injure the general public interest in accessing pay phones, and that preclude fair compensation. The conclusion is ineluctable that the Commission has plenary authority to regulate (1) “commissions” on interstate and intrastate ICS calls; (2) ancillary surcharges; and (3) new and emerging ICS technologies and services.

### **A. Interstate Rates**

Interim rate caps were set on interstate ICS calls in the Commission’s 13 November 2013 Report & Order. Those rate caps should be made permanent.

Here, it should be noted that the interim rates may be higher than adequate to ensure fair compensation. Data submitted by ICS providers at various stages of this protracted proceeding

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<sup>9</sup> 47 U.S.C. § 154(i); *accord*, 47 U.S.C. § 303(r)(empowering the Commission to make “such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act”).

have been convoluted and opaque.<sup>10</sup> Inconsistently reported cost data vary based on type of call, call duration, type of facility, size of facility, both inclusive and exclusive of commissions, security features, and a host of other factors.<sup>11</sup> From that information, it is difficult or impossible to ascertain any reliable and precise measurement of actual costs, although such a determination would seem to be of critical importance to the financial welfare of the providers. This may suggest that ICS profit margins are generally so high, and their assessment that the prospect of meaningful reform is so remote, that transparency and precision are not industry objectives.

### **B. Intrastate Rates**

It is clear that ICS providers are subject to regulation of all aspects of their businesses under 47 U.S.C. Section 276.<sup>12</sup> That authority necessarily extends to intrastate rates, in addition to interstate rates.<sup>13</sup> *See, e.g., Illinois Pub. Telecommunications Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 423 U.S. 1046 (1998)(affirming Commission's deregulation of local payphone rates and rejecting argument that Section 276's reference to "compensation" implied lack of jurisdiction over "rates").

Intrastate calls originating in a correctional facility constitute an enormous percentage of the ICS market.<sup>14</sup> If industry practices are to accord with the public interest, and if rates can ever be made just and reasonable, it is crucial that a comprehensive regulatory regime encompass intrastate ICS calls.

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<sup>10</sup> *See, e.g., Rates for Interstate Inmate Calling Services, Protective Order*, WC Docket No. 12-375, 28 FCC Rcd 16954 (2013) (Protective Order).

<sup>11</sup> *See, generally*, 2nd FNPR, *supra* n. 2, at pp. 25-26 (summarizing industry data submissions).

<sup>12</sup> 47 U.S.C. § 276(d)(defining "payphone service" to include inmate telephone service).

<sup>13</sup> "[Section 276] applies, without jurisdictional limit, to both 'intrastate and interstate' payphone service calls, and similarly without regard to whether the payphone service is provided on a common carrier or non-common carrier basis." 2<sup>nd</sup> FNPRM, *supra* n. 2, at p.15, n. 106. *See also, supra* at pp. 5-6.

<sup>14</sup> Comments of Darrell Baker, *supra*, n.5, at Tr. p. 25 ("the preponderance of inmate calling is intrastate").

### **C. Tiered Rates**

Based upon information that has been introduced into the record and developments subsequent to the Commission's Report & Order of November 2013, it appears that there may be significant cost differentials in the provision of ICS services to jails in comparison to costs associated with generally larger, longer-term confinement facilities. For instance, an apparently persuasive case for a waiver was presented to the FCC which was based on the argument that the cost of providing ICS to jails exceeded the interim caps set out in the Report and Order that became effective on 11 February 2014.<sup>15</sup> The FCC found "good cause" to grant a temporary waiver (with certain limitations) to the interim interstate rate caps, finding that "below-average-cost state ICS rates" and related circumstances constituted "extraordinary circumstances."<sup>16</sup>

Similarly, in a proceeding that comprehensively addressed ICS on the state level, "the Alabama PSC has adopted per-minute rates of \$0.30, decreasing to \$0.25 over two years, for jails and \$0.25, decreasing to \$0.21 over two years, for prisons."<sup>17</sup>

Thus, it appears that there is a sound basis for rate caps that take into account the differences in the cost of providing services at comparatively smaller, shorter-term facilities such as county jails.

### **D. Site Commissions**

The FCC firmly concluded that site commissions are not a part of legitimate ICS costs. . Rather, commissions are negotiable allocations of profits between the correctional facility (or "site locations") and the ICS provider.<sup>18</sup> As such, site commissions should be prohibited.

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<sup>15</sup> Order, Pay Tel Communications, Inc.'s Waiver of Interim Interstate ICS Rates, WC Docket 12-375 (11 Feb. 2014).

<sup>16</sup> *Id.*, at p.7

<sup>17</sup> 2nd FNPR, *supra* n. 2, at p 28 & n. 192, *citing* Final Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957, at 49 – 50 (rel. July 7, 2014)[Alabama PSC Further Order].



The Commission has previously declared that it has authority to “regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.” *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008). The Commission based its decision on opinion of the Court of Appeals for the District of Columbia in *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). In that case, the court determined that the Commission did not exceed its authority in promulgating a rule that prevented domestic carriers from paying more than certain, settled rates for termination services provided by foreign telecommunications companies in order to complete long-distance calls. The court explained that the Commission “does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.” *Id.* at 1230.

“[S]ite commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.”<sup>19</sup> Neither should they be compensable in intrastate rates.

#### **E. If There Are Any Real Costs Associated with ICS, They Must Be Borne by Correctional Authorities**

It has been argued that eliminating site commissions would directly affect correctional authorities’ revenues and lead to adverse consequences for inmate programs and services. That the elimination of site commissions would affect revenue for correctional facilities is undeniable. But the provision of programs and services for prisoners is sometimes required by law, and in

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<sup>18</sup> *Id.* See also, *Second Report & Order*, FCC 97-371 (CC Docket No. 96-128, 9 October 1999); *Third Report & Order*, FCC 99-7, ¶ 156 (CC Docket No. 96-128, 4 February 1999).

<sup>19</sup> Report & Order, *supra* n. 4, ¶54, p. 29. *Accord*, Final Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957, p. 15 (rel. July 7, 2014).

other instances, is simply required by sound correctional policy. For example, courts have held that the deprivation of an opportunity for physical exercise can constitute “cruel and unusual punishment.”<sup>20</sup>

The provision of telephone services in a correctional facility is required by sound correctional policy.<sup>21</sup> Moreover, the provision of such services furthers correctional goals of maintaining security and reducing recidivism.<sup>22</sup>

There would seem to be no reason that costs associated with ICS in a correctional facility should be treated differently from other ordinary operating expenses, which are generally borne by taxpayers. Like security services, education, and rehabilitation programs, telephone services are an essential component of orderly operations in a correctional facility. They are as important to good order, discipline, and morale as any other component of safe and humane living conditions, and they contribute just as much to a decent quality of life for prisoners and staff.

Like other citizens, the families of prisoners already bear their fair share of taxes, including that portion of the tax bill that funds correctional facilities. It is unfair to impose upon them additional and disproportionate costs arising from telecommunication with their incarcerated loved ones.

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<sup>20</sup> See, e.g., *Anderson v. State of Colorado Dept. of Corrections*, (1:10-cv-01005) 2012 U.S. Dist. Lexis 120309 (D. Colo.). Accord, *Thomas v. Ponder*, (#09-15522) 2010 U.S. App. Lexis 14592 (9th Cir.)(exercise is a “basic human necessity”). See, also, American Bar Assoc. [ABA] Standards for the Treatment of Prisoners, Standards 23-3.6 (2010)(requiring daily opportunities for significant out-of-cell time and for recreation).

<sup>21</sup> See, e.g., ABA Standards for the Treatment of Prisoners, Standards 23-3.6 (2010)(Correctional authorities should afford prisoners a reasonable opportunity to maintain telephonic communication . . . at the lowest possible rate). See also, Resolution on Excessive Phone Tariffs, The American Correctional Association (ACA)(October 1996); Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (ACA 2001) and related standards (ACA 2002)(incorporated into standards manuals for 11 types of correctional facilities)(offenders should have access to a range of reasonably priced telecommunications services).

<sup>22</sup> See Report and Order, *supra*, n. 4, ¶¶ 2-3 (inmate recidivism decreases with regular family contact, which benefits the public broadly by reducing crimes, lessens the need for additional correctional facilities and cutting overall costs to society, and also has a positive effect on the welfare of inmates’ children).

But beyond those considerations, it is not clear that any substantial costs arise from the provision of ICS in a correctional setting. Significantly, there is no consensus as to what constitutes legitimate costs of ICS in prisons or jails. Estimates that have been provided by the most dominant ICS providers vary so widely as to raise questions as to the reliability of any of them.<sup>23</sup>

Such costs as correctional facilities may actually incur in providing ICS are almost certainly exceeded by the value that telecommunications services provide. Telephone usage and contact with family and friends improves morale among prisoners and reduces violence among prisoners and between prisoners and staff. Compliance with rules of conduct is ordinarily a precondition to telephone access, which is a privilege. The suspension of that access is likewise an effective punishment for violation of facility rules. The availability of telephone services means fewer injuries and associated medical expenses, less destruction of property, and reduced administrative costs in disciplinary proceedings. And many studies have shown that strong ties between prisoners and their families, fostered by frequent telephone communications, reduces recidivism and thereby, the costs of incarceration. These factors, though difficult to quantify in absolute dollars, are at least as real and meaningful as the incidental costs to correctional facilities associated with the operation of ICS.

There is no consensus about the factors that could legitimately comprise a reliable estimate of ICS costs at a correctional facility. The data that have been submitted are anecdotal, of questionable accuracy, in some cases, internally inconsistent.<sup>24</sup> In addition, there has been no attempt to analyze the quality of the data, there are no agreed measurements of institutional

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<sup>23</sup> See, e.g., 2<sup>nd</sup> FNPRM, *supra* n. 2, at p. 20, ¶ 42 (summarizing industry estimates of correctional facility ICS costs).

<sup>24</sup> See, e.g., Global TelLink Notice of Ex Parte, Attachment 2 (19 September 2014).

administrative cost accuracy or efficiency, and the data are replete with unrealistic assumptions about staffing costs. Indeed, any list of factors that could be compiled would still be susceptible to manipulation and creative accounting – a temptation too great for institutions that are perennially underfunded.

But even if there were agreement about the elements that constitute legitimate ICS operational costs, and even if those costs could be reliably quantified, there would remain the very real and practical difficulty of assessing and reimbursing those costs given the broad range of correctional facility types, circumstances, and cost-differential estimates. Constant changes in institutional mission, populations and staffing, and physical plant mean that costs at a single facility will vary from year to year, and even from quarter to quarter. The impossibility of auditing all of these variations at the thousands of U.S. correctional facilities<sup>25</sup> is obvious and insurmountable.

There simply is no fair, accurate, or reliable means to ascertain whether there are any legitimate costs associated with ICS at each distinct correctional facility. Neither can an “average” or “typical” cost be presumed for any particular type or size of facility. Nor is there any principled basis upon which to impose any such cost on a discrete and disadvantaged subset of taxpayers simply because they happen to have an incarcerated friend or loved one.

Thus, under federal statutes, case law, regulatory decisions, and as a practical matter, the Commission has well recognized, broad jurisdiction over contractual arrangements between ICS providers and correctional facilities, which extends to site commissions. And such commissions,

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<sup>25</sup> In 2005, the most recent date for which data is available, the Bureau of Justice Statistics found that there were 1,821 state and federal correctional facilities in the U.S. That total does not account for jails or short-term detention facilities, facilities of the military, U.S. Immigration and Customs Enforcement, Bureau of Indian Affairs, U.S. Marshals Service, private prisons, or correctional hospital wards not operated by correctional authorities. Census of State and Federal Correctional Facilities, 2005, Bureau of Justice Statistics (October, 2008), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530> (last accessed 2 January 2015).

as well as in-kind payments, exchanges, allowances, and all other arrangements designed to return a profit to correctional agencies or institutions of government, should be entirely prohibited.<sup>26</sup>

## **F. Ancillary Fees**

As the Commission has found, ancillary fees “impose significant additional burdens on consumers and considerably inflate the effective price they pay for ICS.”<sup>27</sup> Indeed, such charges may constitute more than 38% of consumers’ costs for ICS.<sup>28</sup>

There is already an expansive, imaginative, and growing list of ancillary charges<sup>29</sup> which baffle and confound consumers. An abbreviated list includes fees to open, maintain, close, and refund ICS customer accounts. There are often additional charges for bill processing, bill statements, and so-called “regulatory cost recovery.” “The sheer number of ancillary charges, their varying nomenclature, and the variability of the amounts charged cause considerable customer confusion, let alone consternation.”<sup>30</sup>

These charges are not cost-based, but are merely a means for ICS providers to pad their profits, particularly as an offset to ever-increasing site commissions and lower ICS rates.<sup>31</sup> The

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<sup>26</sup> After extensive regulatory investigations, public hearings, and legislative inquiries, New Mexico banned “commissions” in 2001. NMSA § 33-14.1 (2001), <http://public.nmcompcomm.us/NMPublic/gateway.dll/?f=templates&fn=default.htm> (last accessed 29 July 2013). \*

<sup>27</sup> 2<sup>nd</sup> FNPRM, *supra* n. 2, at p. 33, ¶ 80.

<sup>28</sup> See Letter from Peter Wagner, Exec. Dir., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 10 (filed May 9, 2013)(Please Deposit All of Your Money Study); *see also*, 2014 ICS Workshop Transcript at 152 (Vincent Townsend, President, Pay Tel)(“I would argue that [ancillary fees are] actually getting higher with the advent of the single-call program.”).

<sup>29</sup> A listing of ancillary charges reported pursuant to the Mandatory Data Collection of the 2013 Report and Order can be found at , 2<sup>nd</sup> FNPRM, *supra* n. 2, at p.33, n. 238.

<sup>30</sup> 2<sup>nd</sup> FNPRM, *supra* n. 2, at p. 34, ¶ 80.

<sup>31</sup> See, e.g., Alabama PSC Further Order at 20 (“The Commission postulates that ICS providers offering abnormally high site commissions are either grossly exaggerating their reported service costs or they are compensating for calling revenue losses by substantially inflating ICS charges that are not exposed to site commissions.”). (Cont’d)

FCC has correctly concluded that it has jurisdiction and the authority to regulate such fees.<sup>32</sup>

And, even among ICS providers, there is broad consensus that, at a minimum, such fees should be strictly limited.<sup>33</sup>

One particularly troubling abuse arises in a recent industry trend to offer per-call/per connection charges. Widely varying fees assessed at call initiation, problems related to early and improper termination of calls, and the impact of such charges on the overall cost of short calls impel the conclusion that per-call/per-connection charges should be banned.<sup>34</sup> Such a prohibition would reduce provider costs related to customer complaints and bill adjustments.

With limited exceptions, ancillary fees constitute unjust and unreasonable charges under §201(b), and/or unfair compensation under §276.

Actual fees charged by third party payment processing companies such as Western Union, or MoneyGram may constitute one category of possible exception. Since consumers have a choice over whether and which services to employ, it seems fair to permit charges to be passed through to the consumer, so long as no portion of the fee is retained or returned to ICS providers.

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One industry official has publicly identified the elimination or reduction of these superfluous charges as a means to preserve “commission” revenue and to avoid FCC regulation. The CEO of NCIC, which provides telecom services to inmate facilities, has written an open letter to sheriffs and jail administrators in response to the Notice. See Bill Pope, *The FCC is Taking Steps to Regulate Rates and Fees Charged by Inmate Telephone Providers*, LinkedIn.com (Mar. 8., 2013), <http://www.linkedin.com/groups/FCC-is-taking-steps-regulate-3400924.S.220528568?view=&gid=3400><http://www.linkedin.com/groups/FCC-is-taking-steps-regulate-3400924.S.220528568?view=&gid=3400924&type=member&item=220528568> (Some “providers are also adding on Bill Statement Fees, Wireless Fees and other convenience fees that are as high as \$3.95 per call”).

<sup>32</sup> Report and Order, *supra* n. 4, at 14157-58, ¶ 91.

<sup>33</sup> See, e.g., CenturyLink Aug. 14, 2014 *Ex Parte* Letter at 2; CenturyLink FNPRM Comments at 18 (“Without controls on ancillary charges, the practical effect of rate caps is likely to be limited, if not wholly neutralized.”); accord, 2014 ICS Workshop Transcript at 132 (William Pope, President, NCIC); *Id.* at 140 (Vincent Townsend, President, Pay Tel Communications); and Securus July 23, 2014 *Ex Parte* Letter at 2.

<sup>34</sup> See, Alabama PSC Further Order at 1-2 (The Alabama PSC has proposed eliminating per-call charges).

Similarly, as long as consumers may pre-pay accounts via check or money order without paying a premium, it may be reasonable to permit ICS providers to charge a modest fee to cover the cost of debit and credit card transactions, with some permissible increment for transactions involving a live operator.<sup>35</sup>

Finally, because security features are evolving and vary from one facility to another, it would not be objectionable to allow a separate, additional charge that is limited to recovery of the actual cost of the feature at employed each facility where the feature is actually in service, and at which the charge is being assessed – as demonstrated in a filed tariff that fully documents that cost.<sup>36</sup>

Other ancillary charges, such as those for account set-up, bill processing, bill statement, regulatory cost recovery, and the like, are merely attempts to offset ordinary costs of doing business and should be recoverable using a per-minute rate cap. Similarly, so-called “convenience payment single call services” should be treated as all other ICS calls and should be subject to the same caps on rates and related regulations.

The FCC’s legal authority to regulate or prohibit these ancillary charges is as certain and expansive as it is for other aspects of ICS practices. If the FCC establishes a regulatory scheme which ensures that “all payphone service providers [including inmate phone service providers] are fairly compensated for each and every completed intrastate and interstate call,” additional, extraneous surcharges would, by definition, run afoul of the Commission’s charge to ensure that

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<sup>35</sup> Cf., Alabama PSC Proposed Order at 16, and Alabama PSC Sept. 30, 2014 Ex Parte Letter at 9-11.

<sup>36</sup> Cf., Alabama PSC Proposed Order at 16; and Alabama PSC Further Order at 82-87.

“[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable.”<sup>37</sup>

The FCC should take cognizance of its jurisdiction under §276 of all calls originating from a correctional facility and strictly circumscribe ancillary fees, as the Alabama PSC and New Mexico PRC have done on the state level.<sup>38</sup>

### G. Waivers

“[T]he Commission’s standard waiver process applies to ICS . . .”<sup>39</sup> Thus, a service provider may obtain permission to charge higher rates upon a showing of good cause.<sup>40</sup> The Commission’s waiver procedure has been used at least three times since the Report and Order issued in November 2013.<sup>41</sup>

The waiver process is well established, with clear factors to be considered in reviewing such a request.<sup>42</sup> One formulation appears in the Inmate Calling Order on Remand and NPRM:

Unless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for each of these services, both its direct costs and some contribution to common costs, or (ii) the overall profitability of its payphone operations is deficient because the provider fails to recover its total

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<sup>37</sup> Cf., Title 47 U.S.C. § 276(b)(1)(A), *with* § 201(b).

<sup>38</sup> See, Alabama PSC Further Order at 56. See also, New Mexico Public Regulation Commission, Petition to Commence Rulemaking Proceeding for Institutional Operator Service Providers, Case No. 10-00198-UT, Final Order and Final Rule (issued Nov. 8, 2012)(prohibiting all fees except payment processing fees for credit card or check by phone payments and a refund fee).

<sup>39</sup> 2<sup>nd</sup> FNPRM, *supra* n. 2, at p. 32, ¶ 79, *citing* Report and Order, *supra* n. 4, at 14153-54, ¶¶ 82-84.

<sup>40</sup> *Id.*

<sup>41</sup> See generally, *Pay Tel Waiver Order*; see also, *Rates for Interstate Inmate Calling Services*; *Securus Technologies Inc., Petition to Expand Pay Tel Waiver*; *Securus Technologies Inc., Petition for Leave to Add Fee for Voice Biometrics Technology*, Order, WC Docket No. 12-375, 29 FCC Rcd 5973 (2014).

<sup>42</sup> See, Report and Order, *supra* n. 4, at 14153, ¶82.



costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been ‘fairly compensated.’

Inmate Calling Order on Remand and NPRM, 17 FCC Rcd 3248 at 3257-58, ¶ 23.

Thus, any undue hardship that results from rate caps can be readily redressed through the waiver process.

## **II. ONLY THE FCC CAN ESTABLISH A COMPREHENSIVE REGULATORY SCHEME THAT ENSURES FAIR COMPENSATION AT JUST AND REASONABLE RATES**

The overwhelming technological complexity of the prisoner telecommunications industry, a morass of almost incomprehensible industry terms and acronyms, and the monopolistic character of ICS contracts are all beyond the ken of practically all prisoners and their families.<sup>43</sup>

State regulatory commissions have expertise and may be familiar with ICS issues that arise in their jurisdictions, but they have neither the responsibility nor the capacity to regulate a nationwide industry. Moreover, with very few exceptions,<sup>44</sup> state regulatory bodies have shown little awareness or responsiveness to the egregious abuses of the ICS industry. Indeed, “In at least four states, this includes Virginia, Colorado, Florida, and Tennessee, the utilities commission either does not have authority, or the courts have held they do not have authority to regulate the cost of prison telephone calls, which leaves the FCC as the only regulatory body that would have that authority to do so.”<sup>45</sup>

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<sup>43</sup> According to one study, for example, approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

<sup>44</sup> New Mexico and Alabama are notable exceptions. *See, e.g.*, New Mexico, NMSA § 33-14-1 (banning site commissions); and Final Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957, p. 15 (rel. July 7, 2014).

<sup>45</sup> Comments of Paul Wright, FCC Workshop on Further Reform of Inmate Calling Services, Transcript pp. 56-57 (9 July 2014).

Widely divergent regulations, items of call billing that are not tariffed, and broad discrepancies in calling rates that can generously be characterized as arbitrary, all demonstrate that regulation at the state level continues to be largely ineffectual. Federal regulation is required because coherent and effective policies simply cannot be successfully developed and implemented by 50 independent state utilities commissions. Thus, oversight of the ICS industry by, and guidance from the Federal Communications Commission would greatly benefit those regulatory officials.<sup>46</sup>

## CONCLUSION

Despite the best regulatory efforts of some state utilities commissions and, notwithstanding reasoned, incremental efforts by the FCC, the ICS industry has been permitted to shamelessly exploit the friends and families of prisoners for decades. A nationwide industry that wholly lacks the kind of competition that can protect consumers, widely divergent ICS practices that all work to the disadvantage of consumers and the public, and the inability of state regulators to address industry abuses on a comprehensive basis all point to the need for a federal approach to regulation of ICS providers.

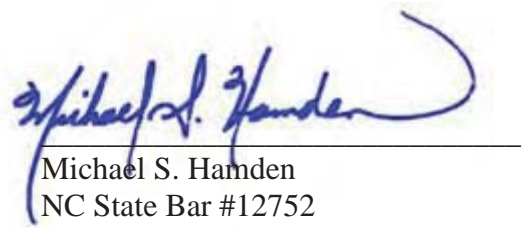
Immediate action is urgently needed and long overdue. State commissions, unregulated ancillary fees, and other ICS practices subvert competition in the ICS market and demonstrate the need for reform that encompasses all aspects of the business, including: (1) a prohibition of commissions, including in-kind payments, exchanges, allowances, and all other arrangements designed to return a profit to correctional agencies or institutions of government; (2) a limitation

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<sup>46</sup> See, e.g., The National Association of State Utility Consumer Advocates Resolution 2006 – 2 (2006), urging the FCC and Congress to reform inmate telephone rates by ensuring just and reasonable calling rates, discouraging or reducing “commissions,” encouraging debit calls, and requiring just and reasonable rates on collect calls.

on the rates charged for interstate and intrastate calls of all kinds (including debit, pre-paid, and collect calls) which do not accede the actual, reasonable cost of ICS services in the correctional setting, plus a reasonable return; (3) the strict regulation of service charges (permitting a modest fee to defray the actual cost of debit, credit card transactions, as well as those involving a live operator); (4) close scrutiny of fees charged by third party payment processing companies, permitting no fee that exceeds actual, reasonable costs with no profit to ICS vendors; (5) the elimination of all other ancillary fees; (6) a requirement that tariffs be filed for additional charges to recover the actual cost of security features employed at each facility where such service is in place and the charge is being assessed; and (7) the prohibition of per-call/per-connection charges, “convenience” payment fees, and all other mechanisms that result in charges that exceed the established rate caps.

Respectfully submitted this 12<sup>th</sup> day of January, 2015.



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